Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 63.

Supreme Court U.S.
FILED
NOV 6 1903
JAMES H. McKENNEY,
Clerk.

THE ANGLO-AMERICAN PROVISION COMPANY,
Appellant,

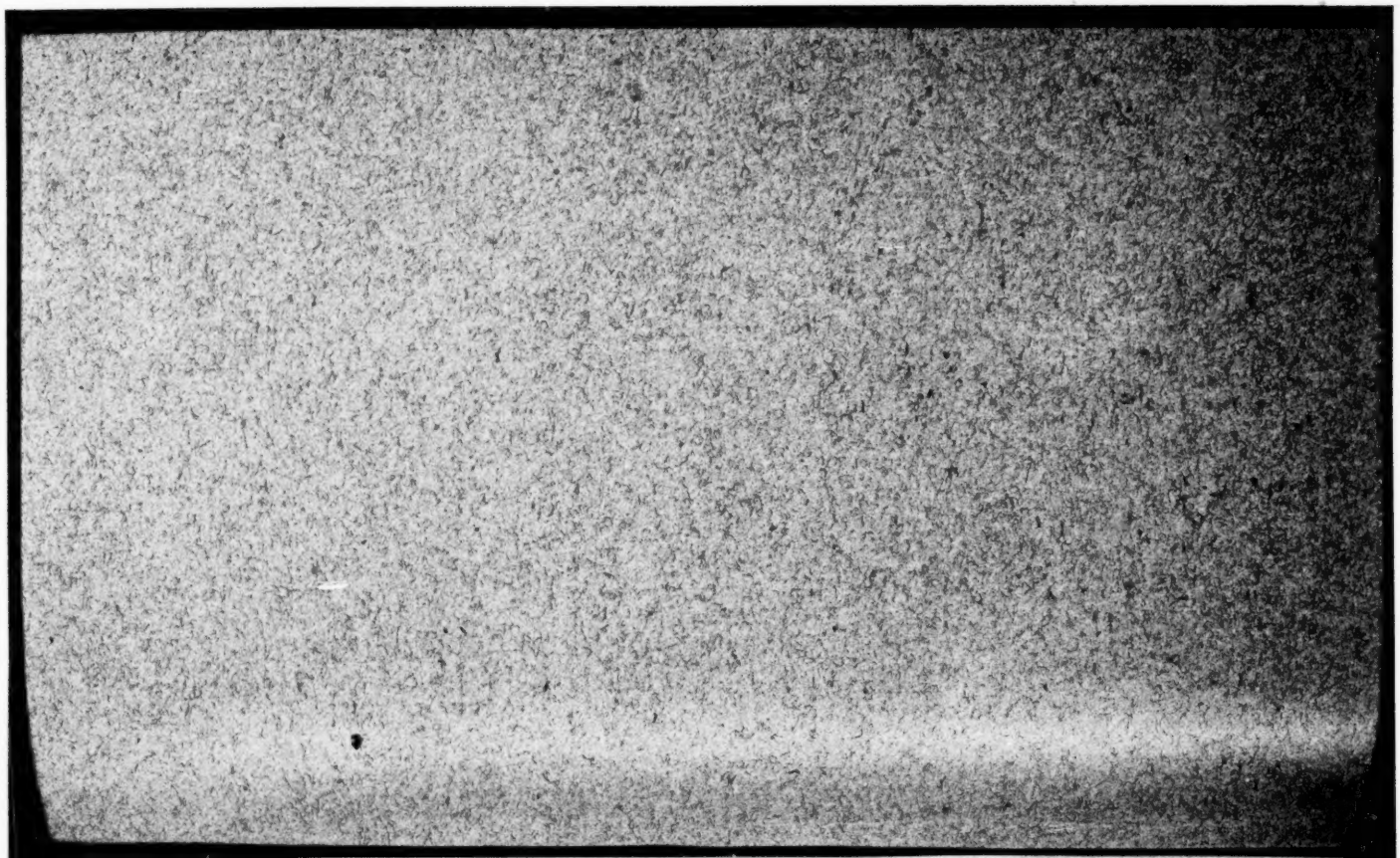
against

DAVIS PROVISION COMPANY, *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT ON THE PART OF THE APPELLANT.

HENRY WILSON BRIDGES,
Counsel for Complainant.



Supreme Court of the United States,

OCTOBER TERM, 1903.

THE ANGLO-AMERICAN PROVISION COMPANY,
Appellant,
against
DAVIS PROVISION COMPANY, *et al.*
No. 63.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Brief and argument on the part of the appellant.

STATEMENT OF CAUSE.

In November, 1893, the complainant, an Illinois corporation, instituted an action in the State of Illinois against the defendant, the Davis Provision Company, also an Illinois corporation. The defendant duly appeared in said action, and judgment was subsequently recovered for the sum of five thousand dollars ($5,000), no part of which has been paid.

In June, 1894, the defendant, the Davis Provision Company, brought an action in New York State against the complainant in this action and Fowler Brothers, Limited, a foreign corporation, organized under the laws of Great Britain, in which they recovered a judgment against the joint defendants for about nine thousand dollars ($9,000). That judgment was sustained against the defendants jointly, for the reason that the said corporations were found by the referee to be identical in fact and interest, as regards business relations with the Davis Provision Company. This latter judgment for Nine thousand dollars ($9,000) was taken on appeal to the Court of Appeals, and final judgment therein was entered on the 16th day of July, 1900, for a little over Nine thousand five hundred dollars ($9,500).

In November, 1899, complainant brought an action in New York State to establish against the Davis Provision Company the judgment obtained by it in the State of Illinois. The defendant demurred to this complaint. The demurrer was sustained both in first instance and on appeal to the Appellate Division of the Supreme Court of New York State (Transcript pp. 1-5). The complaint, the demurrer and the opinion of the Appellate Division are respectively Exhibits A, B and C of the record (Trans. pp. 5-8). Complainant brought this action praying that the judgment of the State of Illinois, which, it alleges, arose out of the same transactions as the judgment obtained by the Davis Provision Company, should be set off against the judgment of New York State, on the ground that the decision of the Appellate Division of the Supreme Court of that State deprives complainant of a right secured to it under the constitution and laws of the United States.

The defendants duly appeared in said action, and

filed their demurrer (Trans. pp. 9-10), which said demurrer was overruled by the Court (Trans. pp. 11-12), and defendants given the privilege to answer over. The defendants thereupon duly answered (Trans. pp. 13-24). The answer of the defendants, Smith M. Weed, Merchants' Bank and Henry Davis, having been once amended pending the litigation (Trans. p. 13).

This amended answer contains the whole defence, the other answers being merely repetitions or amplifications, except in one respect, which will be noted later. This answer alleges as follows:

FIRST. It admits all the matters of record alleged in the complaint.

SECOND. They deny that the New York judgment was sustained against the Anglo-American Provision Company and Fowler Bros., Ltd., jointly on the ground that said corporations were identical in fact and interest (Trans. p. 13).

THIRD. They deny that the Illinois and New York judgments arose out of the same transactions (Trans. p. 14).

FOURTH. They claim that Smith, Conway & Weed have a first lien on the New York judgment for professional services, and that Smith M. Weed is entitled to the remainder by virtue of an assignment dated May 25th, 1895, which assignment was made in pursuance of an agreement made about October 23rd, 1893, that payment of certain loans should be secured by these claims against the Anglo Company (Trans. pp. 15-16); and further, that this assignment was made for good consideration and without any knowledge on the part of said Smith M. Weed of complainant's rights in the premises (Trans. p. 15).

FIFTH. That the complainant has been guilty of laches in not diligently prosecuting the Illinois judgment, and that when sued in New York, complainant did not set up by way of counterclaim the subject matter of said judgment (Trans. p. 15).

These issues were heard on the record, before Mr. Justice Coxe, who found for the defendants on the merits (Trans. pp. 129-132).

From this decision complainant appealed directly to this Court (Trans. p. 134) on the ground that complainant's suit was based on a clause of the constitution.

Notwithstanding the denials in the answers that the New York and Illinois judgments arose out of the same transactions and also that the New York judgment was sustained against complainant and Fowler Brothers, Ltd., jointly on the grounds of identity, *the allegations of complainant's bill stand in both respects uncontradicted on the record* (Trans. pp. 43-44, 52, 7th and 8th clauses of stipulation, pp. 40-41).

As stated by the Court, *the "only defences relied on"* were (1) the assignment to Weed and (2) laches of the complainant. We will therefore in the argument confine ourselves to these two points. Trans., p. 129) and the question of jurisdiction.

Specification of Errors.

FIRST. The Court below erred in finding that the cause of action in the Illinois suit might have been counterclaimed in the New York suit and *vice versa*.

SECOND. The Court below erred in finding "that in order to pay the judgment it was necessary to borrow $13,500 from the Plattsburgh National Bank. The bank agreed to loan the money pro-

vided the defendant, Smith M. Weed, would endorse the paper, the Davis Company to give him as security the claims against the Anglo-American Company a certain stock, that turned out to be worthless."

THIRD. The Court below erred in not finding that there was no competent evidence whatever of any transaction between the defendant, Smith M. Weed and the Merchants' National Bank of Plattsburgh, affecting the relations between the Anglo-American Provision Company and the Davis Provision Company as regards the subject matter of this action.

FOURTH. The Court erred in taking into consideration the testimony relating to the alleged transactions between the defendants Smith M. Weed, Davis Provision Company and The Merchants' National Bank of Plattsburgh alleged to have taken place during the year 1893 and in not holding that all such evidence was incompetent, irrelevant and immaterial and was not the best evidence, but was all secondary evidence.

The specific testimony is contained in the record (Trans., pp. 48-49, 52-53) and is partly as follows:

Questions addressed to the witness Henry Davis, president of the Davis Company.

Q. In 1893 did you make a loan in behalf of your company through the Merchants' National Bank of Plattsburgh of $13,500?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. What paper or obligation was given for the loan?

Same objections.

A. Three notes.

Q. Who were the parties to these notes?

Same objection, and that it is not the best evidence.

A. They were signed by myself and endorsed by Mr. Weed one note, I think, and one note was signed by Mr. Weed and endorsed by me and were in favor of the Davis Provision Company (Trans., pp. 48-49).

Q. Will you look at the copies of the notes handed you and say if they are copies of the notes which you gave at the time you obtained the loan of $13,500?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir. (Trans., pp. 52-53).

FIFTH. The Court below erred in holding that there was no "direct proof that Weed knew at that time of the claims which were afterwards included in the Illinois suit."

SIXTH. The Court below erred in not finding that it was a necessary presumption that Weed at that time knew all about the claims which were afterwards included in the Illinois suit.

SEVENTH. The Court below erred in finding that "on the 27th day of May, 1895, during the pendency of the action which resulted in the $9,678 judgment, the Davis Company transferred by written assignment the claims in controversy to said Weed."

EIGHTH. The Court below erred in not finding that there never was or never has been any valid assignment of any claims involved in this proceeding by the Davis Provision Company to Smith M. Weed.

NINTH. The Court below erred in finding that the "evidence that the company exercised dominion over the claims after the assignment to Weed" was "insufficient to overthrow the positive proof that the assignment and the agreement therefor were in fact made."

TENTH. The Court below erred in not finding that the various acts of dominion exercised by the said Davis Provision Company after October, 1893, and especially their setting up of the subject matter of the New York judgment in counterclaim to the action in Illinois out of which arose the judgment in suit was sufficient to invalidate any attempted assignment to the defendant Weed.

ELEVENTH. The Court below erred in not finding that the written assignment made on the 27th day of May, 1895, was made during the insolvency of the said Davis Provision Company to convey its assets to its director and vice-president, and was presumptively fraudulent and void.

TWELFTH. The Court below erred in holding that "the action of Weed in procuring $13,500 on his own personal credit and paying it into the company's treasury was an act from which he could derive no personal benefit and which was likely to result as in fact it has resulted in pecuniary loss to him." That it was done in the interest of the creditors and in good faith, to enable the company to pay this debt; that it was done to prevent insolvency.

THIRTEENTH. The Court below erred in holding "that the assignment of May 27th, 1895, was the fulfillment of the agreement of October 23rd, 1893, and that it was a *bona fide* transaction."

FOURTEENTH. The Court below erred in holding "that the judgment recovered in the Supreme

Court of New York, December 13th, 1895, and affirmed by the Court of Appeals, July 16th, 1900, which was nominally in favor of the Davis Company was actually in favor of Smith M. Weed against the Anglo-American Provision Company."

FIFTEENTH. The Court below erred in holding that it was the established rule "in this State that the *bona fide* assignee of a judgment can collect it of a judgment debtor notwithstanding the fact that afterwards the latter recovers a judgment against the assignor. The second judgment cannot be set off against the first."

SIXTEENTH. The Court below erred in not finding that the *bona fide* assignee of the judgment cannot collect it of the judgment debtor where the judgment debtor has recovered a judgment against the assignor and the assignor was insolvent at the time of the assignment where the said judgment did not arise out of a judgment sounding in tort.

SEVENTEENTH. The Court below erred in holding, that though at the time "Weed acquired an equitable interest in the chose in action against the Anglo-American Provision Company, his interest was liable to be defeated by counterclaim properly asserted against the Davis Company," still it was not defeated because no such claims were asserted and complainant is guilty of laches because it might have pleaded the same in set off in the New York action.

EIGHTEENTH. The Court below erred in dismissing the bill of complaint herein.

NINETEENTH. The Court below erred in not adjudging that the amount of the judgment obtained in the State of Illinois by said complainant against

the said defendant, The Davis Company, be set off against and deducted from the amount of the judgment obtained in the State of New York by the said Davis Provision Company against the complainant herein and Fowler Brothers (Limited); that the defendant, The Davis Provision Company and its assigns, be forever enjoined from enforcing the judgment obtained in New York State by the said Davis Provision Company except for the excess of the amount of said New York judgment over and above the amount of said Illinois judgment, less a reasonable amount to cover the costs of complainant in this its present action; also that the defendant, The American Surety Company, be forever enjoined from paying over to the other defendants herein any sum or sums except the excess of said New York State judgment over said Illinois judgment, less a reasonable amount to cover the costs of complainant in this its present action."

Argument.

FIRST. The Court had jurisdiction of the cause of action.

SECOND. The Court erred in paying any attention to the transaction relating to notes alleged to have been made in December, 1892, and reduced to judgment in October, 1893. The fact was immaterial, and the evidence incompetent [Trans., pp. 129-130, 134-135, assignments 2nd, 3rd, 4th, 12th and 13th].

THIRD. The Court erred in finding that the assignment to Weed dated May 27th, 1895, was a valid assignment, good as against complainant for the following reasons:

a. Weed had full knowledge of the equities in complainant's favor [assignments 5th and 6th].

b. The Davis Company, with Weed's consent, exercised full dominion over the subject matter of the purported assignment after the date thereof [assignments 9th and 10th].

c. The assignment was by an insolvent corporation to its director and vice-president to secure an antecedent debt [assignments 11th, 12th and 16th].

FOURTH. The Court erred in finding we were guilty of laches in not pleading the subject matter of the Illinois judgment in set-off when we were sued in New York [assignment 17th].

I.

The Court had jurisdiction of the cause of action.

That the complainant had the right to bring this action in the U. S. Circuit Court under the Civil Rights statute is fully borne out by the decision below (Trans., pp. 11-12), and the case of the Northwestern Fertilizing Company vs. Hyde Park (3 Biss., 480).

II.

The Court erred in paying any attention to the transaction relating to notes alleged to have been made in December, 1892, and reduced to judgment in October, 1893. The fact was immaterial and the evidence incompetent.

The Court in its decision is very plainly of the opinion that this evidence was of great weight. Granting for the sake of argument that it is all

true, it simply means that the vice-president (Trans., p. 115) of the Davis Company lent his credit to the company for the purpose of paying off lawful judgments obtained against it by the Anglo-American Provision Company. The transaction was closed and the company became indebted to Weed. What the nature or origin of this indebtedness was can have no bearing on this case. Yet the Court goes into a long discussion of this very matter, commenting it as "a laudable and necessary act" (Trans., pp. 130-131).

There is no competent evidence of the facts stated.

All these transactions relate to written documents. Copies of the notes were allowed in evidence after complainant had objected to them as not the best evidence, and no attempt was made to show that the originals had been lost or destroyed (Trans., pp. 48-49, 52-53, and 4th specification). Although the said notes were claimed to be the consideration for the pretended assignment.

III.

The Court erred in finding that the assignment to Weed dated May 27th, 1895, was a valid assignment, good as against complainant.

Let us first consider the facts and circumstances relating to this document.

This assignment, which is Defendant's Ex. "A" of March 15th, 1901 (Trans., pp. 35-38), is dated May 27th, 1895 (Trans., p. 36), the same date on which receivers of the company were appointed both in Illinois and New York (Trans., pp. 69,

126). In the original, the document was typewritten and *the date was written in* (Trans., p. 66).

It is signed,

DAVIS PROVISION COMPANY,
By Henry Davis, (Seal),
Prest. (Trans., p. 36).

On the 24th day of the month, three days before the assignment, both Weed and Davis swore the company was insolvent (Trans., pp. 123, 125).

This instrument was never acknowledged until after it was offered in evidence on this trial, nearly six years after the date (Trans., pp. 66, 36-37), and no record of authorization on the part of the Company was ever produced, *although expressly called for* (Trans., p. 66).

In fact, defendants do not really seem to have known very much about this assignment themselves until this litigation arose, for after all the testimony was taken, *they moved to amend the answer of defendant Weed, which was done on the* 22nd *day of March*, 1901 (*Trans., p.* 13), *by alleging that the assignment was made pursuant to an agreement made on or about October* 23rd, 1893, *to indemnify said Weed for certain indorsements* (Trans., p. 16). Previous to that time the allegations of this answer were in the same form as the other answers as to this assignment.

This instrument purports to convey the claim out of which the judgment arose, which is involved in this action and against which we are seeking set-off, together with five other actions to said Smith M. Weed (Trans., pp. 35, 36).

They do not allege that transfer was actually made by written document until May 27th, 1895. Shortly before that time, a meeting, they claim, was held at one of two places, when they actually authorized the assignment of these claims (Trans.,

pp. 62-63). At this time, the assignee and assignor only being present, a resolution was passed directing the transfer of the assets of this company to its director and vice-president, Smith M. Weed (Trans., p. 63).

This meeting was apparently of too little importance to reduce the minutes to writing, although the by-laws of the corporation expressly command that this be done (Trans., pp. 112-113, Sects. 14-16).

This, too, notwithstanding this whole arrangement was made, they allege, in October, 1893, and they produce *minutes of a meeting of the corporation held on December* 2nd, 1893 (Trans., p. 116), which meeting was attended by both Weed and Davis.

Why all this silence about the assignment of eighty-five thousand dollars' worth of claims in suit?

(A)

Weed had full knowledge of the equities in complainant's favor (assignments 5th and 6th).

Although defendant Weed denies any knowledge of our rights in his answer (Trans. p. 15), he is forced on cross-examination to admit that in December, 1893, he, the vice-president of the Davis Company, at a meeting of the directors of that company, moved the following resolution:

> "Resolved, That all matters relating to any and all claims, disputes, settlements and litigation between this company and the Anglo-American Provision Company, Fowler Brothers, and Anderson Fowler, and everything connected therewith, be and the same

> hereby are referred to the president *and vice-president* with full power and authority (Trans., pp. 63-64)."

It has been held that where a cause of action is assigned during the pendency of the action, but before judgment, and judgment is afterwards obtained thereon, a judgment in favor of the judgment debtor and against the judgment creditor may be set-off against it, when the assignment of the demand was taken by the assignee with notice of the equity of set-off.

Lammers v. Goodeman, 69 Ind., 76.

This is exactly our case, except in our case we allege insolvency and there they do not.

We admit that there are cases holding that the assignment of a demand previous to the entry of judgment upon it, transferring a legal or even an equitable title to such demand, gives the assignee a superior equity to that of a party claiming a right to set off a judgment previously recovered against the assignor, and prevents the right of set-off from accruing.

Am. and Eng. Encyc., p. 459.
Mackey v. Mackey, 43 Barb., 58.

We respectfully submit that all such cases can be easily distinguished from the case at bar. They are all cases arising in tort where no right of set-off exists previous to entry of judgment, and the principle established is, that if these claims are assigned to protect an attorney's lien, or in consideration of charges, after verdict and before entry of judgment, that the mere subsequent entry of judgment would not allow a defendant to set-off against the same a judgment against the plaintiff which he had purchased, although entry of judgment without any assignment, transferring the

claim in tort into one on contract, would have given a right to set-off against plaintiff in the tort action where none existed before.

There is much confusion in the statement of the doctrine in the New York cases, but this seems to be the rationale of the decisions.

We submit that wherever set-off has been refused in any case on account of assignment it may be distinguished from our case on one or both of the following grounds:

FIRST. The assignment will be found to be of a cause of action arising in tort.

SECOND. There will be no allegation or proof of insolvency or knowledge of defendant's rights on the part of the assignee.

The New York cases also seem to make a distinction between cases where the remedy is sought on a summary application and where it is sought by Bill in Chancery.

Pignolet v. Geer, 19 Abb. Pr., 267.

This case quotes

Barber v. Spencer, 11 Paige, 517,

as follows:

> "The right of set-off upon a summary application to a court of law or equity exists only in cases where the debts on both sides are liquidated by judgment or decree, before the assignment of either to a third party." It then goes on to say: "It is presumed that the decision of the motion, both in this Court and the Court of Appeals, was upon the authority of the cases cited and others sustaining the same doctrine. *But a Court of Equity, in an action brought for the purpose, may allow set-off where the equitable right to such set-off*

existed before the assignment to a third person, notwithstanding neither of the demands had at that time been liquidated by judgment or decree."

(B)

The Davis Company with Weed's consent exercised full dominion over the subject matter of the purported assignment after the date thereof.

The Davis Company never apparently lost control of these claims for a single instant up to the assignment of May 27th, 1895. It brings action on them in its own name subsequent to October, 1893. It assigns one of the claims to Mark H. Davis, who, in the very assignment of May 27th, 1895, states that, "the avails or recovery were to belong to said Davis Provision Company" (Trans., p. 38).

Moreover, the assignee of said company, appointed in the State of Illinois, scheduled each and every one of these claims as assets of the Davis Company (Trans., p. 127), and they were reported to them as such assets by the New York Ancillary Receivers (Trans., p. 126). Nor is there any mention of any assignment as security or otherwise to Smith M. Weed, *although this occurred three months subsequent to* May 27th, 1895 (Trans., p. 125). Unfortunately, the receivers in New York never filed any schedules at all (Trans., p. 74).

On these facts we submit there never has been any valid assignment whatever of these claims to Smith M. Weed. *It is a foundation principle of the law of assignment that in order to constitute a valid assignment the assignor must lose control and direction over the subject-matter of the assignment.*

Christmas v. Russell, 14 Wall, at p. 84.

THE DAVIS PROVISION COMPANY HAS ALREADY USED THE SUBJECT MATTER OF ITS JUDGMENT AS SET-OFF IN THE ACTION WHICH RESULTED IN OUR JUDGMENT.

It is a good maxim in law as well as morals that "it is a poor rule which does not work both ways," and *it is admitted that in the action out of which our Illinois judgment arose the defendant, the Davis Company, counterclaimed some of the items which are now included in the New York judgment* (*Trans., p. 40*).

Naturally inasmuch as they already had judgment on these items secured by American Surety Company bond they were compelled to withdraw their plea in set-off in the Illinois action which they did by stipulation on December 27th, 1898 (Trans. p. 40).

If the Davis Provision Company could use these claim for purposes of set-off after agreeing to assign them to defendant Weed (Trans., p. 16), what rule of law or equity can prevent our having set-off of a judgment arising out of the very subject matter against which they have pleaded such claims in set-off.

Also Smith M. Weed, the vice-president of the company, having consented to the use of these claims for such a purpose, is estopped from preventing our assertion of the right of set-off of the judgment.

(C)

The assignment was by an insolvent corporation to its Director and Vice-President to secure an antecedent debt.

Where there has been an assignment during the pendency of an action, and previous to the entry of judgment, the right of set-off is never denied, *where the complainant assignor was insolvent at the time of the assignment.*

Gay vs. Gay, 10 Paige, 369.

It was also held in this case that where an equitable right of set-off exists while the parties have mutual demands against each other, and where the demand due the party claiming such set-off is such that it is impossible for him to obtain satisfaction of such debt by ordinary suit to recover the same, Chancery on bill filed will compel set-off of one debt against the other, *and insolvency of the party against whom the set-off is claimed is sufficient ground to authorize the Court of Chancery to grant relief in such cases.* The Davis Provision Company was confessedly insolvent on the 27th day of May, 1895 (Trans. pp. 69, 122, 124). Under these circumstances it is unlawful both under the law of New York State and that of Illinois for an insolvent corporation to convey assets to one of its directors.

Throop vs. Hatch Litho. Co., 125 N. Y., 530.

Rosebloom vs. Whittaker, 132 Ill., 81.

The New York statute, which is simply declarative of the law as it exists both in New York and in Illinois, is as follows:

"Whenever any incorporated company shall have refused the payment of any of its notes, or

other evidence of debt, in specie or lawful money of the United States, it shall not be lawful for such company or any of its officers to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of insolvency, to any person or persons whatever; and every such transfer or assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be void."

Rev. Stat., part. 1, sec. 4, title 4, chap. 18.

The reason for the rule is perfectly apparent. The directors and officers of an insolvent corporation are trustees of its funds, and any appropriation of those funds to the preferential payment of their own debts is presumed to be absolutely fraudulent and void. The Court below, however, has held that because the written assignment of May 27th, 1895, was made in accordance with an agreement entered into in October, 1893, therefore the whole transaction was valid and most commendable (Trans. pp. 130-131). If officers and directors of a quiescent corporation are thus to be allowed to violate the rule of law, it might as well be abrogated; for it will always be found that where there is a transfer of the assets of an insolvent corporation in liquidation of a past indebtedness due to such director or officer, there was just such an agreement for the transfer of those very assets at the time the debt was contracted, as exists in this case.

THE CIRCUMSTANCES SURROUNDING THIS ASSIGNMENT ARE MOST SUSPICIOUS.

Even the Court says: "The business was so informally and carelessly done that the records of the

Davis Company fail to disclose the transaction" (Trans., p. 130). *The first answer failed to allege anything about the agreement of October, 1893.* The company continually used the claims as their own assets even after the making of the written assignment (*supra*). Notwithstanding this, the Court has said: "In order to reach a contrary conclusion the Court must arbitrarily reject the uncontradicted testimony of a number of intelligent and unimpeached witnesses."

Who are these witnesses?

Besides Weed there are two witnesses to this transaction on behalf of defendant in error. They are Henry Davis and John M. Wever. Davis was president of the company, and one of the parties to the notes alleged to have been made in 1893 (Trans., pp. 48, 93). John M. Wever was cashier of the bank that made the loan. This last so-called "unimpeached witness" swears in March, 1901, that Weed is "*morally*" the trustee for the bank to the extent of any sum recovered on the claims involved, because in October 1893, he insisted that Weed should have these claims as security (Trans., p. 54). His reliability is shown by the record in the action instituted by Smith M. Weed in the U. S. Circuit Court for the northern district of Illinois, in which action Weed asked for the appointment of a receiver for the Davis Provision Company (Trans., pp. 120-128; Complainant's Ex. 1). In this action the receiver, the Chicago Title & Trust Company, three months after the assignment, namely, on September 7th, 1895, filed a report to which is attached an inventory of the assets of the Davis Company. *This inventory was furnished by John M. Wever, and includes every one of the claims he now swears were assigned to Davis in 1893* (Trans., pp. 126-127).

IV.

The Court erred in finding that we were guilty of laches in not pleading the subject matter of the Illinois judgment in set-off when we were sued in New York.

If appellant had alleged the subject matter of this Illinois judgment in set-off in the New York action it would of course have been an equity superior to any assignment. This defendants would seem to admit, for they allege in their answers that we did not so counterclaim in the New York suit (Trans., p. 15). The reason for our not doing so is perfectly obvious. *Complainant had eight months previous to the beginning of the New York action started to establish its rights in the State of Illinois* (Trans., pp. 25, 76). Having by superior diligence endeavored to establish these claims between the same parties in the jurisdiction of their domicile, we submit that no court will compel us to try our cause of action *de novo* in a foreign jurisdiction.

> "It is a doctrine of law too long established to require a citation of authorities that where a court has jurisdiction it has a right to decide every question which occurs in the case; and whether its decision be correct or otherwise its judgment till reversed *is regarded as binding in every other court*, and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court."
>
> Central Nat. Bank vs. Stevens, 169 U. S., at 459.

We admit that, had we seen fit so to do, we could have set up the subject matter of our Illinois pro-

ceeding by way of counterclaim in the New York suit, but we insist that it is not necessary, and that our Illinois proceeding protects us to exactly the same extent as though we had counterclaimed in New York State. Unless this is so, the Court will not be giving "full faith and credit" to the Illinois proceeding. We respectfully submit that the courts have never before refused to grant a stay of proceedings where there have been two actions pending between the same parties, on the same subject matter, in different jurisdictions, and to grant abatement whenever judgments have been obtained in either of the actions.

Hurst v. Everett, 21 Fed. Rep., 218.
Walsh v. Durkin, 12 John., 99.

In the latter case the defendant pleaded in abatement another action brought by plaintiffs against defendants upon the same promises and undertakings in another jurisdiction; the plea was demurred to and demurrer sustained, on the express ground (p. 100) that it is the "definitive judgment on the merits only which is * * * conclusive," and further, on the ground (p. 101) "that the judgment at least, if not a recovery in one suit, might be pleaded *puis darrein continuance* to the other suit.

In other words, the Court expressly says it will not allow any such outrageous injustice as is threatened here, and one judgment may be pleaded in bar to another; nor is it necessary that the matter be pleaded by way of counterclaim in the second suit.

Complainant instituted its action in Illinois in November, 1893 (Trans., p. 25).

It is admitted on the record that we were not guilty of laches in not bringing this case to trial in Cook County for a period of two years (Trans., p. 42). The defendant company was insolvent at

the expiration of this time, and had gone into the hands of a receiver (Trans., pp. 69, 122, 124). What possible object, therefore, could we have had in pressing this litigation? The Illinois judgment was valueless to us except for purposes of set-off, and we were at that time engaged in appealing to the higher courts in New York State from what we considered unjust judgments against us.

Final judgment was not entered in the New York action until the 16th day of July, 1900 (Trans., p. 39), and we had on the November preceding taken the first step necessary to establish our judgment in this State (Trans., p. 14).

From June 12th, 1894, the time when they instituted action in this State (Trans., p. 76), up to July 16th, 1900, our hands were tied, for under the New York decisions we could not obtain any set-off pending appeal.

> De Camp v. Thompson, 159 New York., 444.

Certainly defendants are in no position to take advantage of this state of affairs for two reasons.

FIRST. They can show absolutely no injury arising from delay.

It is a fundamental principle of the law of laches that "mere delay alone, short of the period fixed as a bar by the Statute of Limitations, will not preclude the assertion of an equitable right.

It is only when, by delay and neglect to assert a right, the adverse party is lulled into doing that which he would not have done, or into omitting to do that which he would have done in reference to the property, had the right been promptly asserted, that the defence of laches can be considered."

> Gibbons v. Hoag, 95 Ill., at 69.
> Scherer v. Ingerman, 110 Ind., 428.

SECOND. If there is any laches they are equally guilty with ourselves, for the case could have been moved on by them as well as by us (Trans., p. 42).

In closing, we submit that if set-off of one judgment against another is ever to be allowed, it should be granted in this case.

The judgments rose out of mutual, open, running accounts (Trans., pp. 44, 52). There was full knowledge on the part of all parties (Trans., p. 64).

The principal defendant, the Davis Provision Company, who is now opposing the set-off, has itself pleaded the subject-matter of one judgment in set-off to the other (Trans., p. 40).

Complainant has shown superior diligence to defendant in enforcing its rights (Trans., pp. 25, 76).

Respectfully submitted,

HENRY WILSON BRIDGES,
Counsel for Complainant.

[2011]